

Making a Deal in Criminal Law

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In my first year, first semester, criminal law class I assign two separate plea bargaining exercises.¹ Students love these exercises, although not usually for the same reason that I love them. The plea negotiations tend to be the first time students get to act as lawyers and being “in role” is an exhilarating experience, even for those who swore on the first day of class that, “I definitely don’t want to go into criminal law.” I enjoy the plea bargaining exercises because they do a great job of illustrating specific doctrinal concepts and provide an opportunity to discuss professionalism, ethics, the importance of negotiation skills for all lawyers, and the realities of our criminal justice system.

The first plea bargain is a three-defendant drug sales case that I assign early in the semester, after we have covered accomplice liability. The case is a classic prisoners’ dilemma. One defendant is the “heavy” and the other two have less obvious involvement in the offense and little or no criminal record. The two less obviously culpable defendants will get a much better deal if they agree to testify against the third defendant. However, if all three defendants refuse to testify, there is a chance that all will be acquitted due to insufficient evidence. Virtually all of the groups conclude a plea agreement with at least two of the defendants. The “heavy” is usually the defendant who has the hardest time concluding a deal. Occasionally a group will hold fast and all three defendants will refuse to “snitch” no matter how much time they might get.

Although most groups reach agreement, the deals tend to vary widely in terms of whether the defendants get probation or prison and include wide variations in what the testimony of one or more of the defendants is ultimately worth to the individual student-prosecutors. This negotiation exercise illustrates the fact that even though each defendant could be held criminally liable for the same offense it does not mean that each defendant will get the same sentence. Students often express surprise about the significant differences in the deals as they tend to assume that everyone will see the case exactly as they have and therefore have the same experience and same deals (or lack of deals). This exercise provides an

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¹ For other ideas for interactive exercises and problems to use in Criminal Law courses, see *Criminal Law*, AM. BAR ASS’N SEC. OF DISP. RESOL. LEGAL EDUC., ADR, & PRAC. PROBLEM SOLVING (LEAPS) PROJECT, <http://leaps.uoregon.edu/content/criminal-law> (last visited Nov. 4, 2012); *Approaches and Sample Lesson Modules for Criminal Law*, AM. BAR ASS’N SEC. OF DISP. RESOL. LEGAL EDUC., ADR, & PRAC. PROBLEM SOLVING (LEAPS) PROJECT, <http://leaps.uoregon.edu/content/approaches-and-sample-lesson-modules-criminal-law> (last visited Nov. 4, 2012)

opportunity to discuss how variable criminal sentences can be and that there isn't one single standard sentence for any offense. Students also learn that a lawyer's opinion about what is appropriate can make a big difference in the outcome of the case.

Due to the fact that I assign this plea negotiation exercise early in the first semester of law school, I also provide some basic information about plea bargaining, the ethical duties of lawyers, the specific ethical duties of prosecutors, and sentencing (such as the difference between probation and parole). I find this basic explanation helps those students who are initially hesitant to start the negotiation "because I don't know what to do." It also prevents wide-scale ethical violations.

In the second plea negotiation exercise, the defendant is a nineteen-year-old woman charged with attempted murder for shooting her sister in the leg.² The general facts include information about what happened on the day of the shooting, but no information about why this young woman would shoot her sister. Both the prosecution and the defense have confidential information that offers different clues as to the reasons. In addition, the defense lawyer's confidential information includes specific facts that could be a defense as either an excuse or a justification (depending on how the students interpret the facts and apply them to the law). I do this plea bargaining exercise towards the end of the semester and it requires students to review the law of homicide, excuses, and justifications. It also provides a nice review of the theories of punishment and some interesting ethical issues regarding disclosure of information (from both sides). This exercise forces students to think about what facts support, or fail to support, the charge of attempted murder. This case also forces students to decide whether the defense of not guilty by reason of insanity is appropriate. Through this negotiation exercise students realize that mental illness can be a complex issue in the context of criminal cases and confront the difficult choices that both prosecutors and defense lawyers face in deciding how to best handle cases with mental health problems as an underlying cause.

I conduct both of these plea bargaining exercises in large section classes with more than eighty students. I assign the students their roles and their negotiating teams and give them these assignments on the same day that they pick up the hard copies with their roles. In both exercises there is a general information sheet for both sides and separate confidential information specifically for the defense lawyers and prosecutors. The students are instructed that it is an ethical violation to pick up the confidential roles for anyone other than their assigned role. For both negotiation exercises I give the students a week to conduct the negotiation outside of class, with strict instructions to not discuss their plea negotiations with their classmates until we discuss them in class. I explain that this is due to the fact that students will negotiate at different times and that no student should have an

² I am happy to send electronic copies of this plea negotiation exercise if you send an email requesting it to: cynthiaalkon@gmail.com or calkon@law.txwes.edu.

advantage because other students have given them information that is not in the general information or their specific confidential information. I do not require them to conduct the negotiations face to face and many choose to negotiate via email, telephone, or text messages. Inevitably, the method of negotiation affects the negotiation outcomes and provides an opportunity to talk about strategic decisions and the importance of thinking beyond what seems to be the most convenient at the moment and encourages students to think instead about what is in their clients' best interests.

The most active class discussions of the semester are during the two class periods when we debrief the plea negotiations (one full class period for each negotiation).³ The debrief is divided into four broad categories: the actual outcomes or deals for the negotiation; professionalism issues, including ethics; the specific doctrinal areas; and the basics of negotiation theory, as it can be applied to each exercise. Students are required to turn in "plea bargaining outcome sheets" that briefly describe the plea deals or the main issues that prevented them from coming to agreement. I consolidate this information to show them the actual outcomes of the negotiations for the class. I also discuss the ethical issues that arise. Unfortunately, it is not unusual for students to misrepresent information to their counterparts during the negotiation or for prosecutors to commit *Brady* errors.⁴ This gives me an opportunity to discuss both the impact in the context of this particular negotiation and the broader reputational issues including the fact that students are forming their professional reputations in law school during class exercises and discussions. I ask students to consider basic negotiation theory by explaining what they think the underlying interests are for both the prosecutors and the defense lawyers. I also ask about the process of preparing for the negotiation. In the first negotiation of the semester many students do not consider the interests of their counterparts, nor do they consider the importance of who they are negotiating with. Often, by the time they conduct the second negotiation (with different assigned partners) their preparations include finding out more information about who they will be negotiating with and preparing arguments/approaches specific to their counterpart. From a teaching standpoint, these exercises illustrate both doctrinal and practice points beyond the limits of case analysis or in-class hypotheticals. And, through these plea bargaining exercises I see students starting to develop their professional identities as lawyers. I also see their clear excitement at being able to put their newfound doctrinal knowledge to work.

³ I am also happy to send electronic copies of the PowerPoint presentations from these classes.

⁴ *Brady v. Maryland*, 373 U.S. 83 (1963). Before the first negotiation of the semester I give a basic explanation of *Brady* error and cite to this case.

